

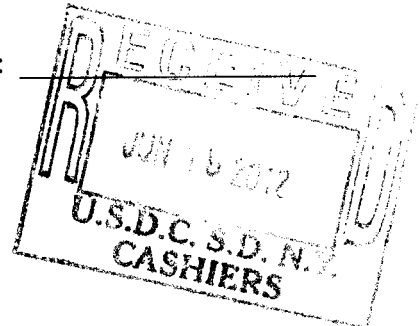
JUDGE BUCHWALD

12 CV 4791

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE COUNCIL, )  
Plaintiff, )  
v. )  
OFFICE OF MANAGEMENT AND BUDGET, )  
Defendant. )

CASE NO.:  
ECF Case



**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. Plaintiff Natural Resources Defense Council, Inc. ("NRDC") asserts violations of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, by defendant Office of Management and Budget ("OMB"). OMB has failed to disclose, in response to NRDC's proper request, responsive records concerning OMB's review of the proposed rule entitled "Revisions to EPA's Rule on Protections for Subjects of Human Research Involving Pesticides; Proposed Rule" (the "Proposed Rule").

**JURISDICTION**

2. This court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 28 U.S.C. § 1331, 5 U.S.C. § 552(a)(4)(A)(vii), and 5 U.S.C. § 552(a)(4)(B). Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B), as plaintiff NRDC is incorporated in New York and has its principal place of business in this judicial district.

**PARTIES**

3. Plaintiff NRDC is a national, not-for-profit environmental and public health membership organization with more than 350,000 members nationwide. NRDC engages in research, advocacy, and litigation related to the testing of pesticides and the use of pesticide testing data to set safety standards for protection of human health and the environment. For

more than twenty years, NRDC has been active in the development, enforcement, and reform of pesticides laws, including the regulation of pesticide testing on humans.

4. Defendant OMB is a federal agency within the meaning of FOIA, 5 U.S.C. § 551(1), and has possession or control of the records that NRDC seeks in this action.

#### **PREVIOUS LITIGATION OVER THE 2006 RULE**

5. On February 6, 2006, the Environmental Protection Agency (“EPA”) published a final rule on human testing of pesticides at 71 Fed. Reg. 6138 (Feb. 6, 2006) (the “2006 Rule”). At the time of its proposal, the 2006 Rule was met with criticism from environmental, religious, labor, and medical groups, scientists, and members of Congress who characterized the rule as inadequate to ensure the scientific and ethical integrity of experiments in which humans are intentionally dosed with pesticides to evaluate the chemicals’ toxicity. As Senator Barbara Boxer noted, “[t]his proposal fails to adequately ensure that people, including the most vulnerable among us, are protected from unethical industry tests in which human subjects swallow, inhale, are sprayed with, or are otherwise exposed to toxic pesticides.”

6. In early 2006, NRDC and other interested parties filed petitions for review challenging the final agency rulemaking. These petitions were consolidated in the U.S. Court of Appeals for the Second Circuit pursuant to an order of the Judicial Panel on Multidistrict Litigation. Some of these petitioners, including NRDC, also filed a complaint for declaratory and injunctive relief in the U.S. District Court for the Northern District of California.

7. In November 2010, the parties finalized a settlement of the pending litigation. Under the settlement agreement, EPA agreed to conduct notice-and-comment rulemaking in accordance with the Administrative Procedure Act on the issue of whether the 2006 Rule should be amended. EPA further agreed that, no later than January 18, 2011, it would sign a notice of proposed rulemaking that incorporated, at a minimum, amendments to the 2006 Rule consistent with terms agreed upon by both parties and attached to the settlement agreement. EPA also agreed that after considering public comments, it would take final action on the proposed rule no

later than December 18, 2011. The agreement contemplated that while EPA developed a new rule, the 2006 Rule would remain in effect.

8. On January 18, 2011, EPA concluded its regulatory review and on February 2, 2011 published a notice of proposed rulemaking in the Federal Register. "Revisions to EPA's Rule on Protections for Subjects in Human Research Involving Pesticides," 76 Fed. Reg. 5735 (Feb. 2, 2011). The Proposed Rule reflected revisions generally consistent with the settlement agreement. NRDC filed comments on the need and justification for the Proposed Rule.

9. On September 22, 2011, EPA sent the Proposed Rule, which incorporated changes made in response to public comments to the Proposed Rule, to OMB for regulatory review. The Proposed Rule was deemed received by OMB on November 7, 2011. On June 8, 2012, OMB deemed the Proposed Rule "consistent with change," meaning that revisions would be made to the Proposed Rule before it would be finalized.

#### **FOIA STATUTORY FRAMEWORK**

10. FOIA, 5 U.S.C. § 552, requires agencies of the federal government to release, upon request, information to the public, unless one of nine specific statutory exemptions apply.

11. Upon receiving a FOIA request, an agency has twenty working days to respond. 5 U.S.C. § 552(a)(6)(A). An agency has the ability to grant itself an extension of ten working days in certain "unusual circumstances." 5 U.S.C. § 556(a)(6)(B)(i). However, FOIA does not permit an agency to delay a response further. Upon an agency's failure to timely respond to a FOIA request, the requestor is deemed to have exhausted administrative remedies and may seek judicial relief. 5 U.S.C. § 552(a)(6)(C)(i).

#### **THE FOIA REQUEST**

12. On April 23, 2012, NRDC submitted a FOIA request to OMB by electronic mail and priority U.S. Mail. NRDC requested records concerning OMB's review of the Proposed Rule. The "records" requested included correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings

including those handwritten or electronically stored. The request sought records in the custody of any OMB office.

13. In the same letter, NRDC requested a fee waiver under 5 U.S.C. §552(a)(4)(A)(iii) on the grounds that disclosure of the requested information is in the public interest. NRDC also noted that it was entitled to a reduction of fees under FOIA as it is “a representative of the news media” under 5 U.S.C. § 552(a)(4)(A)(ii)(II).

14. On April 25, 2012, OMB wrote a letter to NRDC noting that OMB had received the FOIA request on April 24, 2012. On May 21, 2012, OMB wrote NRDC a letter that purported to invoke 5 U.S.C. § 552(a)(6)(B)(i) to extend by ten (10) business days the deadline to respond to the request.

15. Pursuant to the deadlines established in 5 U.S.C. § 552(a)(6), and in light of OMB’s May 21, 2012 letter, OMB’s response to NRDC’s request was due no later than June 5, 2012. To date, OMB has failed to provide NRDC with a response to its request. OMB has also failed to respond to or make any determination on the fee waiver request.

16. NRDC is entitled under FOIA to a waiver or reduction of OMB’s search and production fees with respect to this request. NRDC has a demonstrated ability and intent to analyze and convey information in the requested records to a broad public audience. Disclosure of the requested records will contribute significantly to public understanding of government activities and operations. NRDC is a non-profit organization with no commercial interest in the requested records. NRDC is a representative of the news media, and disseminates information to its members and the general public.

17. NRDC seeks a declaration that OMB has violated FOIA by refusing to disclose responsive records and an injunction ordering OMB to search for and provide those records. NRDC also seeks a declaration that, pursuant to FOIA, it is entitled to a fee waiver or reduction in fees in connection with its FOIA request and an injunction prohibiting OMB from charging for processing the request.

18. NRDC brings this action on its own behalf and on behalf of its members. NRDC seeks the requested records to inform its advocacy concerning experiments in which humans are intentionally dosed with pesticides to evaluate those chemical's toxicity, to inform the public concerning the government's regulation of such experiments, and to inform NRDC's own efforts to ensure that pesticide standards set by EPA are fully protective of human health and the environment. NRDC and its members have been and continue to be injured by OMB's failure to provide responsive records and failure to grant a fee waiver for this FOIA request. The requested relief will redress these injuries.

#### **CLAIM FOR RELIEF**

19. NRDC has a statutory right under FOIA for the records that it seeks, at no cost or at a reduced cost, and there is no legal basis for OMB's failure to search for and disclose all responsive records.

#### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests an Order:

- (1) Declaring that defendant's failure to disclose the records requested by plaintiff in a timely fashion is unlawful;
- (2) Declaring that plaintiff is entitled to a waiver of search and production fees or a reduction of search and production fees with respect to its request;
- (3) Directing defendant to conduct a thorough search for all responsive records;
- (4) Directing defendant to immediately process all requested records;
- (5) Directing defendant to promptly disclose the requested records in their entirety, and make copies available to plaintiff;
- (6) Enjoining defendant from charging plaintiff fees for processing the request;
- (7) Awarding plaintiff its costs and reasonable attorneys' fees incurred in this action; and
- (8) Granting such other and further relief as the Court deems just and proper.

Dated: New York, New York  
June 19, 2012

WILSON SONSINI GOODRICH & ROSATI  
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